No. 3017.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Alexander Gladstone, alias William Vines,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Since this case was set before this court an opinion has been rendered by this court which we believe to be determinative of the only substantial point raised in the brief of counsel for plaintiff in error. On page 21 *et seq.* of the brief of plaintiff in error, under the heading III, appears an argument based upon the hypothesis that section 3 of the Act of January 17, 1914, is unconstitutional and that by reason of the unconstitutionality of this section the evidence pro-

duced on behalf of the Government before the lower court was insufficient to sustain the verdict of the jury and the judgment of the lower court. On October 1, 1917, there was rendered an opinion by this court in the case of Ng Choy Fong, plaintiff in error, v. United States of America, defendant in error, No. 2864, Judge Hunt rendering the opinion, in which the validity of section 3 was upheld. Therefore the entire argument of counsel upon this point may be disregarded in our answering brief. There therefore remains to be discussed points I and II only as argued in brief of plaintiff in error, page 13 *et seq.*

ARGUMENT.

I.

The argument of counsel for plaintiff in error under this number is based upon the order of the court denying plaintiff in error a continuance from the date set for trial before the lower court, in order that the plaintiff in error might apply to the President of the United States for a pardon. The indictment in this case was filed on the 7th day of January, 1916 (erroneously set out as January 7, 1915, on page 7 of the transcript), the plaintiff in error entered his plea of not guilty in open court on the 17th day of January, 1916, and on September 12, 1916, was placed on trial before a jury. Thus there was a lapse of approximately 8 months between the entry of the plea and the date of trial. Granting, for the sake of argument, that the President could pardon a man for a crime before he stood convicted of the same, there was ample time between the

date of the plea and the date of the trial for plaintiff in error to apply for such relief, and the record, at no place, discloses that any application for pardon was ever filed before the trial or since the trial. Such a motion as this is always within the discretion of the court to grant or refuse, and we do not believe that the action of the lower court in exercising its discretion in such a case is a proper ground for an appeal to this court.

In his brief plaintiff in error has cited some cases which he claims sustain his point that he had an inherent right to a continuance for the purpose of appealing for executive clemency. We have carefully examined all of the cases cited in the brief of plaintiff in error, and find none that is comparable to the case at bar. In all of the reported cases which we have been able to find, including those cited by plaintiff in error, the defendant who was applying for a continuance on the ground that he intended to apply for executive clemency, had acted as a witness in a case in which he was one of a number of defendants, and by so acting as a witness an equitable contract arose between him and the Government that he would not be prosecuted, and the courts have uniformly given sufficient time for an appeal for executive clemency in such cases. However, in the case at bar no such situation arises. No one connected with the Department of Justice of the United States has made any promises whatever to this plaintiff in error. He sets up that one John B. Elliott, Collector of Customs at Los Angeles, promised to intercede in his behalf providing he would

disclose where he obtained the opium and all of the circumstances surrounding his possession of it. He further claims that he was promised that nothing he should say would be used against him in further proceedings which might be had against him, and also claims that he understood that he was to be given immunity by reason of the disclosures aforesaid.

If we take the affidavit of plaintiff in error as absolutely true, he still has no contract with the Department of Justice, because John B. Elliott had no authority to make such a contract. The case of United States v. Ford *et al.*, 9 Otto 594, cited in the brief of plaintiff in error, page 13 *et seq.*, holds that even the United States Attorney has no right to make such a contract, therefore much less would some outside party have the right to make such promises. The plaintiff in error was never called upon to testify against any one in this or any other case concerning the matters which he is supposed to have revealed to John B. Elliott, therefore he is not in the same position as would be a defendant who had so testified and by such testimony admitted his guilt in the consummation of a crime. The United States Attorney and the Department of Justice cannot be held responsible for what outside parties may say to the defendant or what representations or what promises may be made without the sanction of the United States Attorney. To be sure, a confession extorted under such conditions could not be used in the trial against the defendant, but the confession of the plaintiff in error was not used against him in the trial of this case, but he was con-

victed entirely upon other testimony. The only place that the United States Attorney's name is mentioned in any of these conversations is on page 43 of the transcript, where Mr. Morganstern stated at one time Mr. Schoonover was present at a conference, but at no place is it alleged that Mr. Schoonover, the United States Attorney, made any promises or representations whatsoever in this matter.

That there is nothing to this assignment of error is further substantiated by the fact that no application for executive clemency was made prior to the trial and executive clemency has not been granted since the trial, although this trial was held more than one year ago.

II.

The argument of plaintiff in error on this point, page 16 *et seq.* of his brief, is to the effect that a conversation in which the defendant took part was admitted in evidence prior to the proving of the *corpus delicti.* This was not the case, but if it had been the case, and the *corpus delicti* were subsequently proved, there would have been no error in this record. In this character of case the *corpus delicti* is the possession of smoking opium. Therefore, since the law makes unlawful the possession of smoking opium or its presence in the United States, whenever smoking opium is found in the United States the presumption immediately arises that a crime has been committed, and it is then competent to connect any person with such crime by his own statements. In this case the presence of the two suit

cases, which contained the opium, in the automobile with the plaintiff in error was conclusively shown before any conversation was admitted, and while the opium had not at that time been discovered in the suit cases, nor had it been examined by an expert, nevertheless the fact remains that it was present, and any conversation concerning the container of the same was entirely competent. It was all part of one transaction, and the part introduced in evidence first was wholly within the discretion of the lower court.

That the testimony set up in the transcript is ample to sustain the conviction, the most casual reading will reveal. This defendant did not take the witness stand in his own defense, and therefore the possession shown by the witnesses for the Government was absolutely unexplained. The suit cases were shown to have been in the possession of this plaintiff in error prior to his going to Imperial Valley, on the return trip from which place he was arrested. His use of a fictitious name, the peculiar actions surrounding his trip, the prior possession of the suit cases, and his statements immediately upon being arrested by the officers, all point to guilty knowledge; so that we have no hesitancy in saying that we do not believe this court will question the sufficiency of the evidence.

We would finally call the court's attention to the anomalous position of this plaintiff in error, in that on the one hand he claims the right to executive clemency because of the revelations he made to John B. Elliott, Collector of Customs, the inference from which is so strong that we must assume that such revelations

showed conclusively his guilt of the crime charged, and on the other hand seeks to have this court set aside the verdict of the jury and judgment of the lower court upon the ground that the evidence is insufficient.

Respectfully submitted,

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